

CASE NO. S-14-000158

IN THE NEBRASKA SUPREME COURT

RANDY THOMPSON,
SUSAN LUEBBE, and
SUSAN DUNAVAN,

Plaintiffs-Appellees,

V.

DAVE HEINEMAN,
Governor of the State of Nebraska;
PATRICK W. RICE, Acting Director of
the Nebraska Department of Environmental
Quality; and DON STENBERG,
State Treasurer of Nebraska,

Defendants-Appellants.

APPEAL FROM THE DISTRICT COURT LANCASTER COUNTY, NEBRASKA

THE HONORABLE STEPHANIE F. STACY

APPELLANTS' OPENING BRIEF

Katherine J. Spohn, #22979
Deputy Attorney General
Ryan S. Post, #24714
Blake E. Johnson, #24158
Assistant Attorneys General
2115 State Capitol
Lincoln, NE 68509-8920
Tel.: (402) 471-2682
katie.spohn@nebraska.gov
ryan.post@nebraska.gov
blake.johnson@nebraska.gov

FILED

APR 21 2014

CLERK
NEBRASKA SUPREME COURT
COURT OF APPEALS



000041363NSC

TABLE OF CONTENTS

Statement of Basis of Jurisdiction.....	1
Statement of the Case.....	1
Nature of the Case.....	1
Issues Presented to the District Court	1-2
How the Issues were Decided	2
Scope of Review	2
Assignments of Error	3
Propositions of Law	3-4
Statement of Facts.....	5
Summary of the Argument.....	7
Argument	8
I. The District Court Erred In Determining Appellees Had Taxpayer Standing.....	8
II. The District Court Erred In Determining LB 1161 Violates Neb. Const. art. IV, § 20.....	15
Conclusion	24
Proof of Service	25

TABLE OF AUTHORITIES

Cases

<i>Andrews v. Ohio Bldg. Auth.</i> , 1975 Ohio App. LEXIS 8467, 23 (Ohio Ct. App. 1975)	3, 12
<i>Banks v. Heineman</i> , 286 Neb. 390, 837 N.W.2d 70 (2013).....	3, 14
<i>Bayard v. North Central Gas Co.</i> , 164 Neb. 819, 83 N.W.2d 861 (1957)	16, 18-19
<i>Brinkman v. Miami Univ.</i> , 2007 Ohio 4372 (Ohio Ct. App. 2007)	3, 12
<i>Broxton v. Siegelman</i> , 861 So.2d 376 (Ala. 2003).....	12
<i>Central Neb. Pub. Power & Irrig. Dist. v. North Platte Nat. Res. Dist.</i> , 280 Neb. 533, 788 N.W.2d 252 (2010)	6-7
<i>Chambers v. Lautenbaugh</i> , 263 Neb. 920, 693, N.W.2d 540 (2002)	3
<i>Citizens Opposing Indus. Livestock v. Jefferson Cty.</i> , 274 Neb. 386, 740 N.W. 2d 362 (2007)	6
<i>Fergus v. Russel</i> , 270 Ill. 304, 110 N.E. 130 (Ill. 1915).....	3, 12
<i>Meyers v. Nebraska Invest. Council</i> , 272 Neb. 669, 681, 724 N.W.2d 776 (2006)	3, 8, 11
<i>Neb. Pub. Serv. Comm'n v. Neb. Pub. Power Dist.</i> , 256 Neb. 479, 590 N.W.2d 840 (1999)	15
<i>Nebraska Pub. Emp. v. City of Omaha</i> , 247 Neb. 468, 528 N.W.2d 297, (1995)	2
<i>Nebraskans Against Expanded Gambling, Inc. v. Nebraska Horsemen's Benevolent & Protective Ass'n</i> , 258 Neb. 690, 605 N.W.2d 803 (2000)	3
<i>Ritums v. Howell</i> , 190 Neb. 503, 209 N.W.2d 160 (1973)	14, 21
<i>Skaggs v. Nebraska State Patrol</i> , 282 Neb. 154, 804 N.W.2d 611 (2011).....	2
<i>State ex rel. Reed</i> , 278 Neb. 564, 773 N.W.2d 349 (2009).....	7
<i>State ex rel. Spire v. Northwestern Bell Tel. Co.</i> , 233 Neb. 262, 445 N.W.2d 284 (1989)	20
<i>State ex rel. State Railway Commission v. Ramsey</i> , 151 Neb. 333, 37 N.W. 2d 502 (1949)	20
<i>State ex rel. Steinke v. Lautenbaugh</i> , 263 Neb. 652, 642 N.W.2d 132 (2002)	8
<i>State ex rel. Stenberg v. Moore</i> , 258 Neb. 199, 602 N.W.2d 465 (1999).....	4, 14

<i>State v. Harris</i> , 284 Neb. 214, 817 N.W.2d 258 (2012)	14
--	----

Statutes

NEB. REV. STAT. § 75-501 (REISSUE 2009) (CUM. SUPP. 2012).....	16, 18
NEB. REV. STAT. § 75-502(REISSUE 2009)	16
NEB. REV. STAT. § 75-601 (REISSUE 1943).....	16
NEB. REV. STAT. § 75-609 (REISSUE 1943).....	19
NEB. REV. STAT. §§ 25-1911 <i>et seq.</i> (REISSUE 2008)	1
NEB. REV. STAT. §§ 25-21,149 <i>et seq.</i> (REISSUE 2008)	1
NEB. REV. STAT. §§ 25-21,213 and 25-21,216 (REISSUE 2008)	1

Other Authorities

NEB. CONST. art. II, § 1	1
NEB. CONST. art. III, § 1.....	1
NEB. CONST. art. IV, § 20	1-2, 13-15, 20-22
NEB. CONST. art. V, § 1.....	1
NEB. CONST. art. XIII, § 3.....	1

STATEMENT OF BASIS OF JURISDICTION

The State appeals the final order and judgment issued by the District Court of Lancaster County on February 19, 2014 pursuant to NEB. REV. STAT. §§ 25-1911 *et. seq.* (REISSUE 2008). The Notice of Appeal was filed, and docket fee deposited, with the District Court on February 19, 2014. See, NEB. REV. STAT. §§ 25-21,213 and 25-21,216. The issues presented on appeal constitute matters of state constitutional interpretation.

STATEMENT OF THE CASE

I. Nature Of The Case

Plaintiffs Randy Thompson, Susan Luebbe, and Susan Dunavan sought declaratory judgment under NEB. REV. STAT. §§ 25-21,149 *et seq.* regarding the constitutionality of LB 1161, 102nd Legislature, Second Session (Neb. 2012).

II. Issues Presented To The District Court

1. Whether Appellees had standing to challenge the constitutionality of the provisions of LB 1161.
2. Whether Appellees' claim for declaratory and injunctive relief was moot.
3. Whether LB 1161 violates NEB. CONST. art. IV, § 20.
4. Whether LB 1161 delegates the authority to grant the power of eminent domain contrary to NEB. CONST. art. II, § 1 & NEB. CONST. art. V, § 1.
5. Whether LB 1161 violates the due process clause of NEB. CONST. art. II, § 1 & NEB. CONST. V, § 1.
6. Whether LB 1161 constitutes special legislation in violation of NEB. CONST. art. III, § 18.

7. Whether LB 1161 pledges the credit of the State in violation of NEB. CONST. art. XIII, § 3.

III. How The Issues Were Decided

1. Appellees had standing as taxpayers to challenge the provisions of LB 1161.
2. Appellees' claims were not moot.
3. LB 1161 violates NEB. CONST. art. IV, § 20 by divesting the Public Service Commission of control over common carriers.
4. LB 1161 does not delegate legislative authority over eminent domain.
5. The District Court deferred making any decision on Appellees' due process claim.
6. LB 1161 does not constitute special legislation.
7. LB 1161 does not unlawfully pledge the State's credit.

IV. Scope Of Review

In an appeal from a declaratory judgment, an appellate court, regarding questions of law, has an obligation to reach its conclusion independent from the conclusion reached by the trial court. *Nebraska Pub. Emp. v. City of Omaha*, 247 Neb. 468, 469, 528 N.W.2d 297, 298 (1995). Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *Skaggs v. Nebraska State Patrol*, 282 Neb. 154, 157, 804 N.W.2d 611, 614 (2011).

ASSIGNMENTS OF ERROR

1. The District Court erred in determining Appellees had established standing as taxpayers to bring their claims.
2. The District Court erred in determining an environmental review of a proposed pipeline route conducted by NDEQ and subsequently approved by the Governor for oil pipelines that are not intrastate common carriers divests the Public Service Commission of authority in violation of NEB. CONST. art. IV, § 20.
3. The District Court erred in considering evidence (“E32”) not admitted to the record.

PROPOSITIONS OF LAW

- I. If a plaintiff lacks standing, a court does not have jurisdiction to adjudicate the lawsuit.
Chambers v. Lautenbaugh, 263 Neb. 920, 927, 693, N.W.2d 540, 547 (2002)
- II. “A person seeking to restrain the act of a public board or officer must show special injury peculiar to himself or herself aside from and independent of the general injury to the public unless it involves an illegal expenditure of public funds.”
Nebraskans Against Expanded Gambling, Inc. v. Nebraska Horsemen's Benevolent & Protective Ass'n, 258 Neb. 690, 693, 605 N.W.2d 803, 908 (2000)
- III. “Exceptions to the rule of standing must be carefully applied in order to prevent the exceptions from swallowing the rule.”
State ex rel. Reed v. State Game & Parks Comm'n, 278 Neb. 564, 571, 773 N.W.2d 349, 355 (2009).
- IV. “The crucial issue is who must ultimately accept the burden of the expenditure.”
Brinkman v. Miami Univ., 2007 Ohio 4372 (Ohio Ct. App. 2007) (quoting *Andrews v. Ohio Bldg. Auth.*, 1975 Ohio App. LEXIS 8467, 23 (Ohio Ct. App. 1975)).

- V. “The right of the taxpayer to sue is based upon the taxpayer’s equitable ownership of such funds and their liability to replenish the public treasury for the deficiency which would be caused by the misappropriation.”

Fergus v. Russel, 270 Ill. 304, 314, 110 N.E. 130, 135 (Ill. 1915).

- VI. “A statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality.”

Banks v. Heineman, 286 Neb. 390, 395, 837 N.W.2d 70, 76 (2013).

- VII. It is the duty of a court to give a statute an interpretation that meets constitutional requirements if it can reasonably be done.

State ex rel. Stenberg v. Moore, 258 Neb. 199, 602 N.W.2d 465 (1999).

- VIII. The Court has a duty “to give a statute an interpretation which meets constitutional requirements if it can be reasonably done, and if a statute is subject to more than one construction, the court is required to adopt the construction which would make the act constitutional.”

Ritums v. Howell, 190 Neb. 503, 506, 209 N.W.2d 160 (1973).

- IX. “The powers enumerated in article IV, § 20 apply only to common carriers.”

Neb. Pub. Serv. Comm’n v. Neb. Pub. Power Dist., 256 Neb. 479, 491, 590 N.W.2d 840 (1999).

- X. A common carrier is an entity that holds “itself out to the public as offering its services to all persons similarly situated... for a consideration or hire.”

Bayard v. North Central Gas Co., 164 Neb. 819, 83 N.W.2d 861 (1957).

STATEMENT OF FACTS

Appellees brought a declaratory judgment action challenging the provisions of LB 1161, a bill amending the statutory framework for evaluating proposed routes for oil pipelines. (T2). In the fall of 2011, Governor Heineman called the Legislature into Special Session in response to public concern regarding a route proposed by TransCanada for the Nebraska-portion of the international Keystone XL pipeline. (E44, 3:6, vol. II). The Governor's stated purpose for the Special Session was to determine "if siting legislation can be crafted and passed for pipeline routing in Nebraska." (E44, 3:6, vol. II).

During the Special Session, the Legislature enacted the Major Oil Pipeline Siting Act ("MOPSA"). (E1:1, vol. I). As originally enacted, MOPSA required pipeline carriers desiring to construct an oil pipeline or make a substantial change to the route of an existing oil pipeline to seek approval for the route from the Nebraska Public Service Commission ("PSC") prior to commencing construction or exercising eminent domain. (E1, 3:1, vol. I).

A second bill enacted during the Special Session, LB 4, originally authorized the Nebraska Department of Environmental Quality ("NDEQ") to "collaborate with a federal agency or agencies in a review under the National Environmental Policy Act" ("NEPA") of routes submitted by a pipeline carrier. (E2, 2:1, vol. I). LB 4 required the Governor to review the collaborative supplemental environmental impact statement and indicate whether it was met with approval. (E2, 2:1, vol. I).

Prior to the LB 1161 amendments, MOPSA made clear its provisions "shall not apply to any major oil pipeline that has submitted an application to the United States Department of State pursuant to Executive Order 13337 prior to the effect date of this act." (E1, 2:1, vol. I). TransCanada submitted a Presidential Permit application with the United States Department of

State on September 19, 2008 seeking authority for the Keystone XL pipeline to cross the border between the United States and Canada. (E44, 2:6, vol. II). LB 4 did not contain a similar exclusion for pipeline carriers that had submitted applications for a Presidential Permit. (E2:1, vol. I).

NDEQ began the process of evaluating the proposed route for the Keystone XL pipeline after passage of LB 4. (E18, 14:3, vol. II). However, the NDEQ's ability to evaluate the route under LB 4 was considered to be contingent upon the existence of an ongoing federal review. (E2:1, vol. I) & (E18, 14:3, vol. II). Thus, when the President denied TransCanada's permit application on January 18, 2012, activity ceased on the evaluation mandated under LB 4. (E18, 14:3, vol. II).

On April 17, 2012, the Nebraska Legislature adopted LB 1161 to amend certain provisions of law relating to siting for major oil pipelines. (E3:1, vol. II). The purpose of LB 1161 was:

to clarify the law a pipeline carrier is to follow depending on the date an application is made for a Presidential Permit from the State Department... [and to provide] a process that would authorize the [NDEQ] to conduct an environmental impact study of a pipeline route going through Nebraska to be used for a federal permit application when there is no federal permit application pending.

(E4, 62:1, vol. II).

To accomplish this objective, the provision authorizing NDEQ review under LB 4 was subdivided establishing the independent authority to evaluate the route "for the stated purpose of being included in a federal agency's or agencies' National Environmental Policy Act review process." (E3, 4:1, vol. II). The original authority to collaborate with a federal agency was left

intact, although subjected to some modification. (E3, 4:1, vol. II) The route evaluation remained subject to gubernatorial approval, which would be conveyed to the federal agency or agencies involved in the NEPA review process. (E3, 4:1, vol. II). If the route evaluation failed to receive gubernatorial approval, the pipeline carrier was allowed to seek PSC approval under MOPSA. (E3, 4:1, vol. II).

SUMMARY OF THE ARGUMENT

Appellees lack standing to bring a facial challenge to LB 1161 under both the traditional rubric as well as the exception applied to taxpayers. The District Court erred in finding that Appellees possessed standing as taxpayers. More specifically, the District Court erred in finding that Appellees were not required to demonstrate that there was no party better suited to bring the challenge and that statutorily-mandated reimbursement was irrelevant to the standing analysis.

As to Appellees' constitutional claim, the District Court erred in concluding that LB 1161 operates in contravention of Article IV, § 20 of the Nebraska Constitution. The analytical framework applied by the District Court appears to examine only whether *some* crude oil pipelines could be considered "common carriers." The question of whether LB 1161 is facially unconstitutional in light of the PSC's exclusive jurisdiction over common carriers requires the court to determine whether *all* crude oil pipelines must be considered "common carriers." To the extent the District Court's analysis reached the latter question and concluded that *all* crude oil pipelines are common carriers, it is deficient in its findings concerning the distinction between *interstate* and *intrastate* pipelines and the "for hire" nature of pipelines as a general category of carriers.

Even assuming *arguendo* the Court determines that *all* crude oil pipelines must be considered common carriers under Nebraska law, the authority created by LB 1161, i.e. to

conduct an environmental evaluation of a proposed pipeline route, is not one enumerated by the Nebraska Constitution and granted exclusively to the PSC.

For these reasons, as set forth more fully below, the Court should dismiss Appellees' claims for lack of standing. In the alternative, the Court should reverse the finding of the District Court and uphold LB 1161 as constitutional.

ARGUMENT

Appellees filed for declaratory judgment in the District Court for Lancaster County, Nebraska on May 23, 2012. Appellees challenged LB 1161 as being unconstitutional on its face. The District Court concluded that Appellees had standing as taxpayers bring the action and that LB 1161 was inconsistent with Article IV, § 20 of the Nebraska Constitution.

I. THE DISTRICT COURT ERRED IN DETERMINING APPELLEES HAD TAXPAYER STANDING.

The District Court erred in finding that Appellees had standing as taxpayers to challenge LB 1161. "The defect of standing is a defect of subject matter jurisdiction." *Citizens Opposing Indus. Livestock v. Jefferson Cty.*, 274 Neb. 386, 740 N.W. 2d 362 (2007). "A party must have standing before a court can exercise jurisdiction, and either a party or the court can raise a question of standing at any time during the proceeding." *Central Neb. Pub. Power & Irrig. Dist. v. North Platte Nat. Res. Dist.*, 280 Neb. 533, 539, 788 N.W.2d 252, 258 (2010).

"Under the doctrine of standing, a court may decline to determine the merits of a legal claim because the party advancing it is not properly situated to be entitled to its judicial determination. The focus is on the party, not the claim itself." *Central*, 280 Neb. at 541, 788 N.W.2d at 260. Traditionally, to possess standing under the common law:

a litigant must have such a personal stake in the outcome of a controversy as to warrant invocation of a court's jurisdiction and justify exercise of the court's remedial powers on the

litigant's behalf. Thus, generally, a litigant must assert the litigant's own rights and interests, and cannot rest a claim on the legal rights or interests of third parties.

Specifically, a litigant first must clearly demonstrate that it has suffered an "injury in fact."

That injury must be concrete in both a qualitative and temporal sense. The complainant must allege an injury to itself that is distinct and palpable, as opposed to merely abstract, and the alleged harm must be actual or imminent, not conjectural or hypothetical. Further, the litigant must show that the injury can be fairly traced to the challenged action and is likely to be redressed by a favorable decision.

Central, 280 Neb. at 541-42, 788 N.W.2d at 260.

The District Court correctly found that Appellees "failed to prove they presently meet the requirements for establishing traditional standing." (T33). However, Appellees alleged they possess standing as taxpayers under the exception to the traditional common law doctrine's requirements. To be sure, the "taxpayer exception" to standing does not constitute a single, well-defined principle.

In allowing the Appellees' claims to proceed under a theory of taxpayer standing, the district court found Appellees need not show: 1) any harm specific to themselves apart from the general public; 2) any contribution to the Cash Fund from which the \$2 million appropriation was designated; or 3) the absence of parties better suited to bring the challenge. In addition, the district court suggested that the taxpayer standing inquiry should not "turn on" the issue of reimbursement of public funds. (T37). Thus, the district court allowed Appellees to proceed with their claim based solely on their status as Nebraska taxpayers and the fact that the Legislature appropriated \$2 million for the implementation of that statute.

“Exceptions to the rule of standing must be carefully applied in order to prevent the exceptions from swallowing the rule.” *State ex rel. Reed v. State Game & Parks Comm'n*, 278 Neb. 564, 571, 773 N.W.2d 349, 355 (2009). The District Court’s finding that Appellees’ have standing as taxpayers to bring a facial challenge to LB 1161 as an unlawful expenditure of public funds entirely swallows the traditional limitations on standing. The District Court’s decision authorizes a person to challenge an act of the Nebraska Legislature showing evidence of nothing more than status as a Nebraska citizen and an accompanying appropriation.

A. Appellees Have Not Shown There Are No Parties Better Suited To Challenge LB 1161.

Appellees assert taxpayer standing based on nothing more than an allegation that the provisions of LB 1161 are unconstitutional and the fact that an appropriation was included to implement the law. The State submits that the District Court’s adoption of Appellees’ position extends the taxpayer exception beyond a practical, reasonable legal doctrine to one that threatens to remove all meaningful limitations on standing.

The State acknowledges the Court’s recognized exceptions to the “injury in fact” requirement for standing. “Taxpayer litigants have an equitable interest in public funds and can maintain an action to prevent their unauthorized appropriation.” *Meyers v. Nebraska Invest. Council*, 272 Neb. 669, 681, 724 N.W.2d 776, 791 (2006). This exception, however, was not intended to be given without any limitation. “A person seeking to restrain the act of a public board or officer must show special injury peculiar to himself or herself aside from and independent of the general injury to the public unless it involves an illegal expenditure of public funds.” *State ex rel. Steinke v. Lautenbaugh*, 263 Neb. 652, 657-58, 642 N.W.2d 132, 138 (2002). “A resident taxpayer, without showing any interest or injury peculiar to itself, may bring an action to enjoin the illegal expenditure of public funds raised for governmental purposes.”

Meyers, 272 Neb. at 681, 724 N.W.2d at 791. Thus, the taxpayer exception removes or loosens the “distinct” or “particularized” aspect of the “injury in fact” requirement.

The District Court interprets the Court’s holding in *Project Extra Mile*, 283 Neb. 379; 810 N.W.2d 149 (2012), to have created a distinction between taxpayer exception cases where an illegal expenditure or misappropriation has been alleged and those where the allegation is a failure to assess or collect revenues. (T35). There is no basis for such a distinction. The *Project Extra Mile* Court observed that:

We reaffirm our previous holding that a taxpayer’s interest in challenging an unlawful state action must exceed the common interest of all taxpayers in securing obedience to the law. *But the reason for permitting taxpayer actions challenging an unlawful expenditure of public funds exists here. A good deal of unlawful government action would otherwise go unchallenged.* And a claim that state officials have unlawfully expended public funds mirrors a claim that state officials have failed to impose or collect statutorily required taxes. Both claims alleged an unlawful act that depletes the State’s coffers.”

283 Neb. at 390, 810 N.W.2d at 159 (emphasis added).

Accordingly, whether the claim is one for unlawful expenditure or failure to collect revenue, a taxpayer litigant who possesses no injury distinct from the general public should be required to show the legislative enactment would go unchallenged unless the taxpayer has the right to bring the action.

Anticipating the possibility that *Project Extra Mile* may not relieve a taxpayer of the burden of showing no party is better suited to challenge LB 1161, the District Court concluded that Appellees “have satisfied such a requirement in the present case.” (T35). However, the only evidence identified by the District Court is testimony given by a representative of

TransCanada during a Natural Resources Committee hearing. (T35); (E4, 12:1, vol. II). The TransCanada testimony is insufficient to show that no other party is better suited to challenge LB 1161.

The basis for TransCanada's testimony was not explored by Appellees or the District Court; and it cannot be gleaned solely from reading the transcript. Indeed, as the District Court noted, "authority for crude oil pipelines carriers to exercise eminent domain free of pre-authorization or review by any state agency had been in place since 1963." (T57). LB 1161 creates a much more burdensome pre-authorization approval process and requires pipeline carriers to cover the costs of any evaluation. (E3:1, vol II) & (E45:6, vol. II). A reference to an isolated piece of testimony taken out of the much larger context of a pipeline carrier's effort to build an international pipeline does not create sufficient countervailing evidence that pipeline carriers are not better suited and without incentive to challenge LB 1161.

A litigant seeking to rely on taxpayer standing and free itself from the need to show any particularized injury apart from that suffered by the general public should be required to show that no other party is better suited to bring the challenge. Because Appellees failed to make such a showing, the District Court erred in finding standing existed under the taxpayer exception.

B. There Was No "Expenditure" Of Public Funds Under LB 1161.

The District Court also erred in finding Appellees have standing because no "expenditure" of public funds pursuant to LB 1161 was shown to occur. The taxpayer exception to traditional standing requirements frees a litigant from the need to show a particularized injury apart from that suffered by the general public. However, this liberalization should not be interpreted as a complete elimination of the "injury" requirement. A taxpayer still must demonstrate the existence of an "injury" in the form of an illegal expenditure. The \$2 million

appropriation does not establish an “injury” because LB 1161 mandates that pipeline carriers “shall reimburse the [NDEQ] for the cost of the evaluation or review...” with the funds being remitted to the NDEQ Cash Fund. (E3, 4:1, vol. II).

The District Court observed that “Nebraska appellate courts do not appear to have directly addressed the question of what effect private reimbursement of allegedly unlawful public expenditures should have on taxpayer’s standing analysis.” (T37). The State has not found any case in which the issue has been fully considered. However, in *Myers v. Neb. Inv. Council*, the State questioned whether an “illegal expenditure” had occurred when the misappropriated funds had been recovered. See, 272 Neb. 669, 724 N.W.2d 776 (2006). The Court found that despite recovery of the principal and investment income, a “permanent expenditure” in the form of service fees was made pursuant to the investment contracts at issue. *Id.* at 681, 724 N.W.2d at 791-92. Contrary to the ruling of the District Court, the *Meyers* opinion did not establish a bright-line rule making reimbursement irrelevant to the taxpayer standing inquiry. (T37).

LB 1161 requires pipeline carriers to fully reimburse the costs associated with the review process. Accordingly, in the context of Appellees’ facial challenge, there is no “expenditure” that occurs pursuant to LB 1161; NDEQ does nothing under the statute until a pipeline carrier has filed an application. Appellees have not alleged that NDEQ or the Governor misappropriated funds allocated to their use in implementing LB 1161.

The Ohio and Alabama Courts have addressed similar issues and found the presentation of evidence of actual expenditure to be relevant to the taxpayer standing inquiry. See, *Brinkman v. Miami Univ.*, 2007 Ohio 4372 (Ohio Ct. App. 2007) (quoting *Andrews v. Ohio Bldg. Auth.*, 1975 Ohio App. LEXIS 8467, 23 (Ohio Ct. App. 1975)); see also, *Broxton v. Siegelman*, 861

So.2d 376, 384 (Ala. 2003) (quoting *Fergus v. Russel*, 270 Ill. 304, 314, 110 N.E. 130, 135 (Ill. 1915)).

The Ohio Court of Appeals found that when determining whether there has been an illegal expenditure, “[t]he crucial issue is who must ultimately accept the burden of the expenditure.” *Brinkman v. Miami Univ.*, 2007 Ohio 4372 (Ohio Ct. App. 2007) (quoting *Andrews v. Ohio Bldg. Auth.*, 1975 Ohio App. LEXIS 8467, 23 (Ohio Ct. App. 1975)). Under LB 1161, it is the pipeline carrier applicant that bears the burden of the expenditure. Furthermore, the Alabama Supreme Court found that “the right of the taxpayer to sue is based upon the taxpayer’s equitable ownership of such funds and their liability to replenish the public treasury for the deficiency which would be caused by the misappropriation.” *Broxton v. Siegelman*, 861 So.2d 376, 384 (Ala. 2003) (quoting *Fergus v. Russel*, 270 Ill. 304, 314, 110 N.E. 130, 135 (Ill. 1915)). In *Broxton*, the court held that the plaintiff lacked standing because the state funds used to finance the project were reimbursed with federal grant money. *Id.* at 385.

The District Court found these authorities unpersuasive because “the legal standards relied upon by the Ohio and Alabama courts are different and more onerous than the analysis applied by Nebraska courts.” (T36). The State cites these cases as evidence that LB 1161’s requirement for full reimbursement is relevant to question of whether an “expenditure” has occurred. Thus, Ohio’s requirement of particularized injury and Alabama’s reliance on the replenishment of public funds relate to inquiries separate and apart from the question of whether any injury, i.e. “expenditure” has occurred.

The State does not suggest that all taxpayer standing inquiries should “turn on” whether full reimbursement has occurred. However, in the context of a facial challenge to the constitutionality of a statute, where the litigant alleges an “illegal expenditure” has occurred thus

giving rise to taxpayer standing, it is reasonable for the Court to place the burden on that litigant to provide evidence of an actual “expenditure.”

In light of the reimbursement provision in LB 1161, the District Court would have to assume that a pipeline carrier would act contrary to the statute and fail to reimburse all funds associated with the evaluation process in order to show an “expenditure” of public funds. Such a presumption is unwarranted. To allow a constitutional challenge of a statute to proceed because a regulated entity *might* act in an unlawful manner is to stretch the taxpayer standing exception recognized by this Court far-beyond its logical limits. Thus, the District Court erred in finding Appellees had established standing as taxpayers.

II. THE DISTRICT COURT ERRED IN DETERMINING LB 1161 VIOLATES NEBRASKA CONSTITUTION ARTICLE IV § 20.

The District Court also erred in determining that the provisions of LB 1161 authorizing NDEQ to conduct an environmental evaluation of a proposed oil pipeline route and the Governor to review that evaluation unlawfully divests the PSC of its constitutionally-granted authority. NEB. CONST. art. IV, § 20 provides: “The powers and duties of [the PSC] shall include the regulation of rates, service and general control of common carriers as the Legislature may provide by law. But, in the absence of specific legislation, the commission shall exercise the powers and perform the duties enumerated in this provision.” The plain language of Article IV, § 20 extends the scope of the PSC’s constitutionally-mandated jurisdiction only to “common carriers.” To be sure, the Legislature could *statutorily* grant the PSC authority over those crude oil pipelines not considered to be common carriers. However, it has not done so with LB 1161.

Because the entities regulated by LB 1161 are not those “common carriers” over which the PSC has exclusive constitutional authority, the District Court erred in unnecessarily striking the statute. Moreover, even assuming *arguendo* that the PSC were given exclusive constitutional

authority over all crude oil pipelines, conducting an environmental review of a pipeline route does not fall under the authorities enumerated in Article IV, § 20: “rates, service, or general control”.

Appellees challenged, and the District Court passed judgment on, the facial validity of the provisions originating with LB 1161, not merely an unlawful application of the statute to a particular set of circumstances. “A challenge to a statute, asserting that no valid application of the statute exists because it is unconstitutional on its face, is a facial challenge. But a plaintiff can only succeed in a facial challenge by establishing that no set of circumstances exists under which the act would be valid, i.e., that the law is unconstitutional in all of its applications. *State v. Harris*, 284 Neb. 214, 221, 817 N.W.2d 258, 268 (2012).

The Court has a duty “to give a statute an interpretation which meets constitutional requirements if it can be reasonably done, and if a statute is subject to more than one construction, the court is required to adopt the construction which would make the act constitutional.” *Ritums v. Howell*, 190 Neb. 503, 506, 209 N.W.2d 160, 164 (1973); see also, *State ex rel. Stenberg v. Moore*, 258 Neb. 199, 602 N.W.2d 465 (1999). “A statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality.” *Banks v. Heineman*, 286 Neb. 390, 395, 837 N.W.2d 70, 76 (2013). The unconstitutionality of a statute must be clearly demonstrated before a court can declare the statute unconstitutional. *Chase v. Neth, supra*; *Ponderosa Ridge LLC v. Banner County*, 250 Neb. 944, 554 N.W.2d 151 (1996). The District Court failed to heed these principles.

While *some* crude oil pipelines may be properly considered common carriers under Nebraska law, it does not follow that *all* crude oil pipelines are properly (or must be) considered

common carriers. As set forth below, it is reasonable to interpret LB 1161 to apply only to *interstate* crude oil pipelines which are not considered common carriers under Nebraska law.

A. Not All Oil Pipelines Regulated By LB 1161 Are Common Carriers.

Appellees claim that LB 1161 unconstitutionally divests the PSC of authority over common carriers. The District Court, in adopting Appellees' position, found that *all* crude oil pipelines must be considered "common carriers" under Nebraska law. The State submits that the District Court erred in declaring LB 1161 unconstitutional because: 1) not *all* crude oil pipelines are "common carriers" under Nebraska law; and 2) LB 1161 can be reasonably interpreted to apply only to those crude oil pipelines that do not qualify as "common carriers." Because a reasonable interpretation is available to uphold the statute, the District Court erred in declaring LB 1161 unconstitutional.

1. The Legislature Has Limited the Definition of Common Carriers to Only Include Intrastate Oil Pipelines.

In defining the scope of the PSC's constitutional jurisdiction, the Court provided that "the powers enumerated in article IV, § 20, apply only to common carriers." *Neb. Pub. Serv. Comm'n v. Neb. Pub. Power Dist.*, 256 Neb. 479, 491, 590 N.W.2d 840, 848 (1999). The Court recognized that "[t]he term 'common carriers,' as used in article IV, § 20, is coextensive with the meaning of that phrase at common law." *Id.* In turn, the common law suggests two conditions must be present for an entity to possess "common carrier" status: the entity must hold itself out to the public generally as being engaged in the business of transporting from place to place, and must do so for hire. *Bayard v. North Central Gas Co.*, 164 Neb. 819, 827, 83 N.W.2d 861, 866 (1957). These factors have been codified by the Nebraska Legislature.

With regard to pipelines, the Legislature defined "common carriers" as "[a]ny person who transports, transmits, conveys, or stores liquid or gas by pipeline for hire in Nebraska

intrastate commerce....” NEB. REV. STAT. § 75-501 (REISSUE 2009) (emphasis added). The “intrastate” condition found in the definition of “common carrier” has existed since 1963. The previous definition defined “common carriers” as “[a]ny company...formed...for the purpose of transporting...crude oil...*from one point in the State of Nebraska to another point in the State of Nebraska....*” See, *Bayard*, 164 Neb. at 828, 83 N.W.2d at 866 (citing NEB. REV. STAT. § 75-601 (REISSUE 1943)) (emphasis added). Further, the delineation of different categories of pipeline carriers evinces legislative intent that not all pipeline carriers are to be considered “common carriers.” See, NEB. REV. STAT. § 75-502 (describing three categories of pipeline carriers, *one* of which includes those “which are declared common carriers under section 75-501”). As with the definition of “common carrier,” the plain language of the delineation provision indicates that “pipeline carriers for which the Governor approves a route” under LB 1161 are a category of crude oil pipelines distinct from those considered to be “common carriers.” *Id.* In light of the plain language of these provisions, the District Court had reasonable basis for interpreting LB 1161 to not apply to “common carriers.”

Rather, the District Court surveyed the definitions of “common carrier” and concluded that *all* crude oil pipelines qualified. (T59-62). The District Court’s conclusion concerning the applicability of LB 1161 to “common carriers” is deficient. Generally, the District Court’s analysis only reached the question of whether “crude oil pipelines” *can* be considered “common carriers” under Nebraska law. However, the proper analytical framework that should have been applied to determine whether LB 1161 unconstitutionally divests the PSC of authority over common carriers requires an examination of whether *all* crude oil pipelines *must* be considered “common carriers.” While the statutory language provides that crude oil pipelines operating in *intrastate* commerce may qualify as a “common carrier,” those operating in *interstate* commerce

do not. Despite the long-standing presence of an “intrastate” condition in the definition of “common carrier,” the District Court seems to have overlooked the distinction.

In addition to the plain statutory language, the legislative history and context within which crude oil pipelines are regulated provide reasonable basis for interpreting LB 1161 to not apply to common carriers. The purpose of LB 1161 was “to clarify the law a pipeline carrier is to follow depending on the date an application is made for a Presidential Permit from the State Department....” (T24). A Presidential Permit is only required for pipelines that cross an international border. (T27). Furthermore, LB 1161 explicitly distinguishes between pipelines of different sizes, bringing only those “larger than eight inches in inside diameter” within its reach while specifically excluding the smaller “in-field and gathering lines.” See, NEB. REV. STAT. §§ 57-1404 & 57-1502. The exclusion of “in-field and gathering lines” evinces an intent that the review provisions of LB 1161 were not intended to apply to intrastate pipelines.

In light of the plain language of the statutory definition of “common carrier,” the underlying legislative purpose, and limitation on the size of pipelines subject to the evaluation procedures set forth within LB 1161, the statute can reasonably be interpreted to apply only to interstate crude oil pipelines.

2. The “For Hire” Condition Cannot Be Assumed To Be Present For All Crude Oil Pipelines.

The District Court erred in assuming all crude oil pipelines are “for hire.” With respect to pipelines “[a]ny person who transports, transmits, conveys, or stores liquid or gas by pipeline *for hire* in Nebraska intrastate commerce shall be a common carrier subject to commission regulation.” NEB. REV. STAT. § 75-501 (emphasis added). The Court has recognized a common carrier is an entity that it holds “itself out to the public as offering its services to all persons similarly situated . . . for a consideration or hire.” *Bayard*, 164 Neb. at 830, 83 N.W.2d at 867.

Thus, implicit in the District Court's finding that LB 1161 mandates the unconstitutional regulation of common carriers is a finding that all regulated entities are "for hire."

In contrast to a common carrier, a "private carrier is one who, without making it a vocation, or holding himself out to the public as ready to act for all who desire his services, undertakes, by special agreement in a particular instance only, to transport property from one place to another either gratuitously or for hire." *Id.* at 827, 83 N.W.2d at 866. The Court noted in *Bayard* that a "single contract would not make defendant a common carrier," and "[t]he state cannot...arbitrarily impose the character or status of a common carrier upon a mere private carrier or other person who has not devoted his property to such public use." *Id.* at 827 & 832, 83 N.W.2d at 866 & 868. See also, *Neb. Pub. Serv. Comm'n v. Neb. Pub. Power Dist.*, 256 Neb. 479, 590 N.W.2d 840 (1999) (finding the "PSC's constitutional authority over common carriers does not extend to contract carriers.").

The record contains no evidence that *all* crude oil pipeline carriers are "for hire." At trial, the District Court sustained the State's objection to the admission of Exhibit 32. See, Order at 6. Nevertheless, the District Court relied on Exhibit 32 as evidence establishing the "for hire" nature of TransCanada's Keystone XL pipeline. (T61, FN215). Reliance on evidence excluded from the record constitutes error on the part of the District Court.

Furthermore, evidence concerning operational aspects of a particular pipeline project is irrelevant to Appellee's facial challenge to LB 1161. In order for the Court to determine that "no set of circumstances exists under which the act would be valid," evidence would need to establish that the "for hire" condition is be present in all entities to be regulated. Neither Appellees nor the District Court point to any evidence that *all* crude oil pipelines are "for hire." Because a pipeline must be "for hire" in order to be a common carrier, the District Court

unnecessarily struck LB 1161. The District Court could have reasonably interpreted the statute in a manner which sustains its constitutionality.

3. The Authority To Exercise Eminent Domain Is Not Determinative Of Common Carrier Status.

The District Court incorrectly characterizes the authority to exercise eminent domain as the “quintessential indicia of common carrier status.” (T61). There is no basis for this finding. In *Bayard*, the Court found that:

Plaintiff’s contention that defendant was a common carrier because it had exercised the right of eminent domain...has no merit for two reasons. First, the defendant does not render the service of transporting gas for a consideration. Second...defendant in 1950 exercised the right of eminent domain as an interstate pipe line, as distinguished from an intrastate pipe line...which it concededly had a right to do.

164 Neb. at 829, 83 N.W.2d at 867.

The *Bayard* Court observed that the provision granting crude oil pipelines the authority to exercise eminent domain expressly identified interstate carriers as being eligible, then noted the provision was later amended to make intrastate carriers eligible as well. *Id.* at 830, 83 N.W.2d at 867 (citing NEB. REV. STAT. § 75-609 (REISSUE 1943)). However, “[s]uch section in neither event contained any provision that such interstate pipe line companies were common carriers and thereby placed under the control and subject to regulation by the State Railway Commission as common carriers.” *Id.* at 830, 83 N.W.2d at 867. Thus, the authority to exercise eminent domain is not determinative of an entity’s status as a “common carrier.”

B. LB 1161 Did Not Affect A Divestiture Of PSC Authority Enumerated In Article IV § 20.

Even assuming *arguendo* the Court determines oil pipelines regulated under LB 1161 are common carriers subject to exclusive PSC jurisdiction, authorizing NDEQ to conduct an environmental review of a proposed crude oil pipeline route subject to gubernatorial approval does not divest the PSC of an authority enumerated in Article IV, § 20.

“The Constitution includes among the powers and duties of the commission the regulation of rates, service, and general control of common carriers as the Legislature may provide by law, but in the absence of specific legislation its powers and duties as enumerated are absolute and unqualified.” *State ex rel. State Railway Comm’n v. Ramsey*, 151 Neb. 333, 337, 37 N.W.2d 502, 505 (1949). To be sure, “the Legislature cannot constitutionally divest the PSC of jurisdiction over a class of common carriers by vesting a governmental agency, body of government, or branch of government, except the Legislature, with control over the class of common carriers.” *State ex rel. Spire v. Northwestern Bell Tel. Co.*, 233 Neb. 262, 276, 445 N.W.2d 284, 294. Authority to conduct an environmental review of a proposed pipeline route does not fall under the “rates, service, or general control” of common carriers.

The District Court incorrectly analogizes the Court’s holding in *Ramsey* to the present case. (T63-64) (citing *State ex rel. State Railway Commission v. Ramsey*, 151 Neb. 333, 37 N.W. 2d 502 (1949)). The legislation examined by the *Ramsey* Court differed greatly in scope and effect from LB 1161. See, *Ramsey*, 151 Neb. at 336, 37 N.W.2d at 505 (“[t]he Department of Aeronautics shall exercise general control over all aeronautics within this state, including the regulation of rates and services in connection with aeronautics for hire”). The “Legislature attempted by explicit language to absolutely exclude the jurisdiction of the [PSC] over the common carriers by air.” *Ritums*, 190 Neb. at 507, 209 N.W.2d at 164.

Unlike the legislation in *Ramsey*, LB 1161 does not explicitly preclude the PSC from exercising the specifically enumerated authorities of Article IV, § 20. Nor does LB 1161 involve regulation of an entire class of intrastate common carriers, such as air travel. Rather, it involves the environmental evaluation of the route by which a pipeline will travel through the state and gubernatorial approval of that evaluation. The scope of the PSC's jurisdiction, to regulate the rates, service, and general control over common carriers, is unaffected by LB 1161. Thus, even if interstate oil pipelines regulated under LB 1161 are subject to exclusive regulatory authority by the PSC, the siting of a route for a proposed pipeline is not an unconstitutional divestiture of PSC authority.

The Legislature's determination that MOPSA was necessary supports a finding that environmental route evaluations are outside the constitutional authorities granted to the PSC. Presumably, if the PSC's plenary jurisdiction over common carriers included review of route proposals, enactment of a bill to authorize the Public Service Commission to oversee siting of major oil pipelines in the state would have been unnecessary. (E1:1, vol. II). Neither Appellees nor the District Court reconcile the notion that the authority divested from the PSC was once constitutionally possessed, with the fact that the State deemed Legislative action necessary before any regulation of siting could occur.

Accordingly, even if the Court concludes that all interstate oil pipelines are necessarily "common carriers" subject to exclusive regulation by the PSC, the environmental evaluation and approval contemplated under LB 1161 falls outside of the scope of the regulation specifically reserved to the PSC under Article IV, §20.

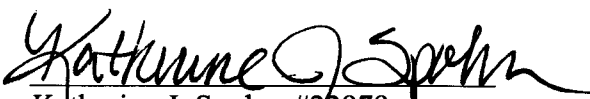
CONCLUSION

The State requests that the Court dismiss Appellees' claims based on the lack of standing. Alternatively, the State requests that the Court reverse the District Court's determination that LB 1161 is unconstitutional under Article IV, § 20.

Respectfully submitted this 21st day of April, 2014,

DAVE HEINEMAN, PATRICK W. RICE, and
DON STENBERG, Appellants,

BY: JON BRUNING, #20351
Attorney General

BY: 

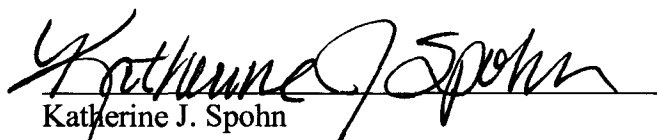
Katherine J. Spohn, #22979
Deputy Attorney General
Ryan S. Post, #24714
Blake E. Johnson, #24158
Assistant Attorneys General
2115 State Capitol
Lincoln, NE 68509-8920
Tel.: (402) 471-2682
katie.spohn@nebraska.gov
ryan.post@nebraska.gov
blake.johnson@nebraska.gov

Attorneys for Appellants

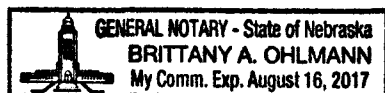
PROOF OF SERVICE

STATE OF NEBRASKA)
) ss.
COUNTY OF LANCASTER)

I, Katherine J. Spohn, being first duly sworn, depose and state that two copies of the brief in the above entitled case were served upon the Appellee by depositing said copies in the United States Mail, postage prepaid, addressed to David A. Domina, 2425 South 144th Street, Omaha, NE 68144, on this 21st day of April, 2014.


Katherine J. Spohn

Subscribed in my presence and sworn to before me this 21st day of April, 2014.




Notary Public